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No. 91-457

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWIN S. NUTBROWN, *et al.*,
Petitioners,

v.

RICHARD A. MUNN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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October 25, 1991

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Petitioners respectfully invite the Court's attention to the following new matters which have arisen since the filing of the petition in this case. After the Supreme Court of Tennessee announced its decision in the case of *L.L. Bean, Inc. v. Bracey*, —— S.W.2d ——, 1991 WL 195305 (Tenn. 1991), on October 2, 1991 taxpayer *Bean* invoked the jurisdiction of the U.S. District Court in Nashville, seeking declaratory and injunctive relief under 42 U.S.C. § 1983.[1] *See L.L. Bean, Inc. v. Huddleston,*

[1] The *Bean* decision is discussed in the Petition in this case at 6. It is also discussed in the Petitioners' Supplemental Brief in Support of Petition for a Writ of Certiorari in the case of *Hogan v. Musolf, petition for cert. filed,* No. 91-380, at 1-2.

C.A. No. 3-91-0817 (M.D. Tenn.). Bean asserts in its District Court complaint that the Tax Injunction Act is inapplicable because the Tennessee Supreme Court has explicitly determined that *Bean* has no available state court remedy. App. A at 1a. The refusal of the Tennessee Supreme Court in *Bean* to exercise its jurisdiction under 42 U.S.C. § 1983, just like the refusal of the Oregon Supreme Court in this case, demonstrates the resulting burden which is likely to fall upon the federal courts if the inverted analysis of the Tax Injunction Act utilized by the Oregon Supreme Court and by the Tennessee Supreme Court in *Bean* is permitted to stand.[2]

On September 16, 1991, the Colorado Supreme Court announced its decision in the *Davis*-related case of *Kuhn v. Colorado*, 1991 WL 179971 (Colo. 1991). Contrary to the result in this case, the Colorado Supreme Court held, in circumstances identical to those in this case, that federal retirees are not required to exhaust futile statutory administrative remedies before bringing an action challenging the constitutionality of a state taxing scheme.[3]

These recent developments further demonstrate the widening conflict among the states with respect to the obligation of state courts to hear and entertain a federal cause of action created by Congress as well as the obligation of the states to provide a clear and certain remedy that is a meaningful one.[4]

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[2] *See* Petition at 12-16.

[3] *See* Petition at 20-22.

[4] The questions presented by the petition in this case are substantially similar to the questions presented in *Hogan v. Musolf*, No. 91-380. Like the respondents in *Hogan*, the Respondents here have also waived their right to file a brief. Petitioners note that this Court has recently postponed its consideration of the *Hogan* petition and advised the Respondents in that case of the Court's request that a brief be filed before November 22, 1991.

CONCLUSION

For the reasons set forth above and in the petition for certiorari, Petitioners request that their petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM COMPLAINT IN *L.L. BEAN, INC. v. HUDDLESTON*

* * * *

JURISDICTION AND VENUE

13. Jurisdiction is based upon a federal question pursuant to 28 U.S.C. section 1331 in that the claims herein are federal constitutional claims arising under 42 U.S.C. section 1983. The Tax Injunction Act is inapplicable since *L.L. Bean* has no available state court remedy, as explicitly determined by the Supreme Court of Tennessee in *L.L. Bean, Inc. v. Bracey*, Docket No. 01S01-9010-CH-00087 (September 9, 1991). Venue is proper inasmuch as Defendants carry out business in this district.

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QUESTIONS PRESENTED

1. Must a taxpayer exhaust adequate administrative remedies mandated by state law before challenging a state tax statute in state court under 42 U.S.C. § 1983?

2a. Where state law provides for a full factual hearing followed by judicial review and in that review the state courts are available to provide the full range of relief sought by petitioners, are the state remedies adequate?

2b. May petitioners avoid the necessity of exhausting state administrative remedies simply by asserting that resort to the administrative process would be futile?

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BRIEF FOR RESPONDENT IN OPPOSITION

I. THERE IS NO CONFLICT AMONG THE STATES.

Petitioners posit the existence of a "sharp divergence of state courts" about the requirement of exhaustion of administrative remedies in tax cases brought under section 1983. Pet. Cert. 8. That assertion does not withstand event the most cursory examination.

In *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), the Oregon Supreme Court held that the courts of Oregon are open to claims brought under section 1983 for refund of taxes and other remedies if the taxpayer first exhausts administrative remedies as required by state law.[1] None of the cases upon which petitioners rely, either in their Petition or their Supplemental Brief, disagrees with that holding. Petitioners' cases hold only that the state courts will entertain section 1983 challenges, a claim with which neither the Department of Revenue (DOR) nor the Oregon Supreme Court has any quarrel. "In fact, Oregon Courts are available to hear claims under § 1983." *Nutbrown*, 311 Or at 337.[2] Many of the cases cited by petition-

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[1]"Taxpayers further argue that, if this court holds that exhaustion of administrative remedies will be required before Taxpayers can bring their § 1983 action, then we will somehow be 'us[ing *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981)] as a guide to or invitation for state courts to decline jurisdiction.' We do not deny that there is state court jurisdiction; we hold simply that the legislature has imposed a constitutionally permissible administrative process before a plaintiff has standing to invoke the jurisdiction of the Oregon Tax Court." *Nutbrown v. Munn*, 311 Or at 342.

[2]Petitioners' assertion that the Oregon Supreme Court acknowledged a split among the states, Pet. Cert. at 6 and n. 4, is inaccurate. The statement on which petitioners rely ("There is no binding case law on point") acknowledged the absence of binding precedent from this Court. *Nutbrown v. Munn*,

(continued...)

ers involve claims brought under or against state tax laws. Most, however, make no mention of a state law exhaustion requirement. None holds that such a requirement, if it existed as a matter of state law, would be excused because the claim was brought under section 1983.[3]

In *Kuhn v. Colorado*, 817 P.2d 101 (Colo. 1991), cited in petitioners' Supplemental Brief, the Colorado Supreme Court held that administrative remedies need not be exhausted in that case. The court, however, rested its decision on state law grounds, not on federal section 1983 grounds as petitioners seek to suggest. The court stated that a party challenging the constitutionality of a statute need not first exhaust the administrative remedies provided in the statute. 817 P.2d at 104. For this proposition the court cited *Fred Schmid Appliance & Television Co. v. City & County of Denver*, 811 P.2d 31, 33 (Colo. 1991). In *Fred Schmid*, the court held that an administrative agency

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[2](...continued)
supra, 311 Or. at 338; Pet. Cert. App. A at 12a. The decisions of other state courts on this issue, obviously, would not bind the Oregon Supreme Court.

[3]*See American Trucking Assns. v. Secretary of State*, 595 A.2d 1014 (Me. 1991); *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991); *Town of Eclectic v. Mays*, 547 So.2d 96 (Ala. 1989); *Burrell v. Mississippi State Tax Comm.*, 536 So.2d 848 (Miss. 1988); *Satellink of Chicago v. City of Chicago*, 168 Ill.App.3d 689, 523 N.E.2d 13 (Ill. App. (1988); *Marx v. Truck Rental & Leasing Assn.*, 520 So.2d 1333 (Miss. 1987); *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402 (1987); *Department of Treasury v. Campbell*, 161 Mich.App. 526, 411 N.W.2d 722 (1987); *423 South Salina Street v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63 (1986); *Holden Arboretum v. City of Kirtland*, 19 Ohio App.3d 125, 483 N.E.2d 167 (1984); *Brower v. Wells*, 103 Wash.2d 96, 690 P.2d 1144 (1984); *Bung's Bar & Grille, Inc. v. Township Council of Florence*, 206 N.J. Super. 432, 502 A.2d 1198 (1985); *Porter v. Treasurer & Collector of Taxes et al.*, 385 Mass. 335, 431 N.E.2d 934 (1982); *Kollasch v. Adamany*, 99 Wisc.2d 891 299 N.W.2d 891 (1980), *rev'd on other grounds*, 313 N.W.2d 47 (1981).

lacked authority to pass on the constitutionality of a statute.[4] *Ibid.* Thus, *Kuhn* is a state law case and does not support petitioners' claim of a conflict among the states on the federal issue they seek to present to this Court.

In *Beverly Bank v. Board of Review*, 117 Ill.App.3d 656, 453 N.E.2d 96 (1983), also cited in the petition, the court expressly stated that a careful reading of the trial court's opinion demonstrated that the court did not apply the exhaustion doctrine. 453 N.E.2d at 99. Hence, the appeals court concluded, "we will not belabor the doctrine of exhaustion of administrative remedies by further consideration." *Ibid. Beverly Bank* is illustrative of petitioners' attempt to manufacture a division among the states where none exists. Careful reading of the cases petitioners cite demonstrates no more than that the state courts agree they must entertain claims brought under section 1983. The federal cases on which petitioners rely stand for the same settled point: state courts must entertain section 1983 claims.[5]

Those state courts actually addressing the issue are unanimous in holding that a party wishing to challenge state tax laws or to seek a refund under those laws must exhaust administrative remedies mandated by state law before seeking relief under section 1983. *See Hogan v. Muslof*, 471 N.W.2d 216 (1991) *pet. cert. filed*, No. 91-380; *Raschke v. Blancher*, 141 Ill.App.3d 813, 491 N.E.2d 1171 (1986); *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985); *Stufflebaum v. Panthiere*, 691 S.W.2d 271 (Mo. 1985); *Johnston v. Gaston*

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[4]Under Oregon law, by contrast, administrative agencies, including DOR, have the authority and obligation to determine the constitutionality of statutes as applied to the cases before them. *See* p. 11, *infra*.

[5]*See* cases cited at Pet. Cert. 7 and 8 and n. 7.

County, 71 N.C.App. 707, 323 S.E.2d 381 (1984), *rev. denied* 329 S.E.2d 392 (1985); *see also Linderkamp v. Bismark School District No. 1*, 397 N.W.2d 76, 80 (N.D. 1986) (court did not address administrative remedies, but held that state law remedies must be pursued). Although the court did not require exhaustion in *Allison v. Board of County Commissioners*, 737 P.2d 6 (Kan. 1987), the basis for that decision was the inadequacy of the state remedies. 737 P.2d at 12. By looking to see whether the state remedies were adequate, the Kansas Supreme Court tacitly acknowledged that some examination of those remedies is appropriate and suggested that exhaustion of adequate administrative remedies may be required.

Petitioners' claim of a conflict among the states about the requirement of administrative exhaustion bursts from even the slightest press of examination. Those states that have directly considered the issue have reached the same conclusion reached by the Oregon Supreme Court. The cases on which petitioners rely in their attempt to demonstrate a conflict hold only that state courts will hear section 1983 actions involving tax claims, an unremarkable conclusion with which neither the Oregon Supreme Court nor DOR disagrees.

II. THE DECISION OF THE OREGON SUPREME COURT IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioners rely on *Felder v. Casey*, 487 U.S. 131 (1988) and *Patsy v. Board of Regents*, 457 U.S. 496 (1982) for the proposition that they need not exhaust their administrative remedies before filing a section 1983 claim. In general, of course, that assertion would be correct. Tax, however, is different. While section 1983 represents a considered congressional choice to intrude federal authority into the normal sphere of state power,

both Congress and this Court consistently and without exception have recognized that, subject to ultimate federal review for constitutionality by this Court, states are free to fashion their own rules for collecting the revenues necessary for the operation of state government. *See Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 102-03 (1981) (discussing the Tax Injunction Act, 28 U.S.C. § 1341, and the history of federal non-interference with state systems of taxation).

Where state procedures include the requirement of exhaustion of adequate administrative remedies as a prerequisite to challenging those tax laws, the federal government — acting through both this Court and the Congress — consistently has chosen to defer to that choice. For example, in *First National Bank of Greeley v. Board of County Commissioners of the County of Weld*, 264 U.S. 450 (1923), the plaintiff sought to recover taxes previously paid, asserting they had been levied in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The district court sustained the defendants' demurrer and dismissed. This Court affirmed.

> We are met at the threshold of our consideration of the case with the contention that the plaintiff did not exhaust its remedies before the administrative boards, and consequently cannot be heard by a judicial tribunal to assert the invalidity of the tax. We are of the opinion that this contention must be upheld.

264 U.S. at 453. Numerous decisions of this Court are in accord. *E.g. Gorham Manufacturing Co. v. State Tax Commission*, 266 U.S. 265 (1924); *McGregor v. Hogan*, 263 U.S. 234 (1924); *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710 (1923); *Farncomb v. Denver*, 252 U.S. 7 (1920). In each of these cases the Court held that the party challenging the

state tax *must* exhaust available and adequate state administrative remedies.

The Court has consistently recognized that pursuing administrative remedies as a prerequisite to judicial relief is an essential part of the design of many states' revenue systems.

> The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules.

McNary, 454 U.S. at 108 n. 6, *quoting Perez v. Ledesma*, 401 U.S. 82, 128 n. 17 (1971), (Brennan, J., concurring in part and dissenting in part) as a "cogent explanation" for the reasons underlying federal noninterference. The Tax Injunction Act, 28 U.S.C. § 1341, is congruent with the decisions of this Court in recognizing that the states must be left free to fashion a coherent system of revenue collection or face fiscal chaos. *See California v. Grace Brethren Church*, 457 U.S. 393 (1982) (*Grace Brethren*). As the Court noted in *Grace Brethren*:

> If federal declaratory relief were available to test state tax assessment, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.

Grace Brethren, 457 U.S. at 410 *quoting Perez v. Ledesma*, 401 U.S. at 128 n. 17 (Brennan, J., concurring in part and dissenting in part).

In *Felder* the Court recognized that Congress was free to impose exhaustion requirements on section 1983 plaintiffs if it chose to do so. 487 U.S. at 148-49. In *McNary*, *supra*, the four member concurrence, written by the author of *Felder*, squarely concluded that the history of the Tax Injunction Act demonstrated a considered Congressional purpose to limit the availability of challenges to state tax statutes brought under section 1983 to those in which administrative remedies had been exhausted.[6]

To be sure, as petitioners argue strenuously, the Tax Injunction Act applies to federal courts. The Act's history, however, demonstrates a broader purpose. As this Court noted in *Grace Brethren*, in enacting the Tax Injunction Act, Congress expressly relied upon the Congressional purpose underlying the Johnson Act of 1934, 26 U.S.C. § 1342, which divests the federal district courts of jurisdiction to enjoin the operation of a public utility commission order. *Grace Brethren*, 457 U.S. at 409 n. 22. That history, as cited by the Court, demonstrates that the purpose of the Johnson Act was "to prevent public utilities from going to federal district court to challenge state administrative orders or to avoid state administrative and judicial proceedings." *Ibid.* The remarks from the Congressional debates reported by the Court demonstrate that Congress intended "to give [the utilities] their rights in every instance to the trial of the question of fact first before the public utility commission." That trial before the administrative agency was to occur "without interference of Federal law." *Ibid.* remarks of Reps. Mapes and Lewis, 78 Cong. Rec. 1916, 1918, 8324 (1934).

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[6]Although the majority in *McNary* based its decision on grounds of comity, nothing in that majority suggests disagreement with the concurrence's view of the intent of the Congress in enacting the Tax Injunction Act.

This legislative history and the rationale underlying this Court's cases deferring to state revenue procedures point up the single most obvious failing of petitioners' argument, a failing petitioners resolutely refuse to address: It is no less intrusive into state revenue collection procedures for a federal statute to require state courts to bypass administrative remedies mandated by state law than it would be for federal courts to bypass those remedies themselves.

The decisions reveal an unbroken history of federal deference to individual state choices in the manner of operating their own revenue systems and the unquestioned recognition that federal review of state taxation is not governed by the same rules by which the federal government oversees other aspects of state business. Seeking to avoid this clear line of authority, petitioners rely almost exclusively on cases that do not involve taxation. Petitioners' narrow focus on *Felder* and *Patsy* enables them to ignore the principles underlying the Tax Injunction Act and the lengthy judicial history of federal noninterference in state methods of tax collection. Interpreting section 1983 to require state courts to bypass state revenue systems would be completely inconsistent with more than a century of considered federal choice to require those who wish to challenge a state's tax system to follow state administrative procedures as long as those procedures are adequate to protect federal rights. The Oregon Supreme Court's opinion pointed out to petitioners that their argument was inherently inconsistent with this Court's tax jurisprudence.

> We understand *McNary* to hold that, given the prime importance of noninterference with state taxing practices, Congress' purpose in enacting 42 USC § 1983 will not be defeated by requiring that complaining taxpayers first

> exhaust their state administrative remedies. If Congress' purpose will not be defeated by such a requirement in federal court, we cannot see how those purposes would be any more thwarted by imposition of precisely the same kind of procedural requirement when the § 1983 action is brought in state court.

Nutbrown v. Munn, 311 Or. at 341; Pet. Cert. App. 15a; *accord LaSalle National Bank v. Rosewell*, 604 F.2d 530, 538-39 (7th Cir. 1979), *rev'd on other grounds*, 450 U.S. 503 (1981); *Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d at 80.

Using a federal statute to force the state courts to do that which both this Court and the Congress have recognized to be extremely destructive to the state's ability to manage its fiscal affairs would be no less intrusive than simply allowing the federal courts to entertain those cases in the first instance. Any court should be reluctant to defeat the Congressional intent underlying the enactment of the Tax Injunction Act by such a logically inconsistent interpretation. *See United States v. American Trucking Associations*, 310 U.S. 534 (1940). Petitioners' failure to address this critical issue despite the Oregon Supreme Court's pointed remarks is a measure of the weakness of their analysis and of their unwillingness to come to grips with the real issues in the case.[7]

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[7]Moreover, the engine driving *Felder* is the principle that the choice of state versus federal court should not be outcome determinative in any particular case. 487 U.S. at 138-41. Unlike other section 1983 claims, that principle simply has no application to tax cases because, except for ultimate review by this Court, the federal courts cannot entertain section 1983 actions in tax cases. *McNary*, *supra*. That is, the outcome of petitioners' claim in federal court would necessarily be dismissal if the state remedies are adequate. The state courts, by contrast, will hear those cases after exhaustion of

(continued...)

III. PETITIONERS' REMAINING ARGUMENTS ARE WITHOUT MERIT.

The remainder of petitioners' arguments are makeweight assertions with little to commend them other than petitioners' willingness to repeat them despite their demonstrable lack of legal or factual support. For example, permeating petitioners' arguments is the assertion that the Oregon Supreme Court's decision deprives petitioners of the opportunity to pursue their claims in the state courts. *See e.g.* Pet. Cert. 8-9, 11 n. 14, 22-24. That assertion, occasionally cast as a claim that the exhaustion requirement clothes the individual defendants with immunity, is simply wrong. The Oregon Supreme Court left no doubt that the courts of Oregon are available to petitioners to pursue their section 1983 claims if they remain dissatisfied after they have exhausted their administrative remedies. *See Nutbrown v. Munn*, 311 Or. at 342-43 and n. 8; Pet. Cert. App. 17a.[8]

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[7](...continued)
administrative remedies. Thus, state and federal courts will necessarily differ in their treatment of these cases. As a result, the central principle of the *Felder* opinion is simply inapplicable to this tax case and, contrary to petitioners' argument, *Felder* is not dispositive of the analysis; it is, rather, largely irrelevant to it.

[8]Petitioners' defamatory suggestion that Director Munn would "manipulate" the administrative process in order to cause the statute of limitations to run, Pet. Cert. 11 n. 14, is supported only by petitioners' determined efforts to claim that the state's administrative process is designed to deny them the very remedies that process seeks to deliver quickly and economically. Moreover, Oregon law provides that if DOR does not resolve a taxpayer's claim within nine months, the taxpayer may proceed directly to the tax court without waiting for further action by DOR. Or. Rev. Stat. § 305.560(5). (All Oregon statutes referred to in this brief are reproduced in the appendix.)

Petitioners' claims that their administrative remedies are inadequate are equally insubstantial. Petitioners assert that the administrative remedy is not adequate because DOR cannot declare a statute unconstitutional, a claim squarely refuted by state law; because any monetary relief awarded by DOR would not be against the defendants in their individual capacities, a claim with no relevance to the adequacy of the remedy; and because the administrative remedy is, in their words, burdensome, a claim refuted by this Court's cases. Finally they argue that resort to the administrative remedy would be a futile, a claim also squarely refuted by this Court's cases.

1. Petitioners' argument that DOR could not determine the constitutionality of the statute they challenge is incorrect as a matter of settled Oregon law. As the Oregon Supreme Court reaffirmed in this opinion, Oregon administrative agencies have the authority and responsibility to determine and declare the constitutionality of statutes as applied to the cases presented to them. *Nutbrown v. Munn*, 311 Or. at 346; Pet. Cert. App. 21a-22a; *Employment Division v. Rogue Valley Youth For Christ*, 307 Or. 490, 770 P.2d 588 (1989); *Cooper v. Eugene School Dist. No. 4J*, 301 Or. 358, 723 P.2d 298 (1986), *cert. denied* 480 U.S. 942 (1987).[9]

2. Petitioners also assert that their administrative remedy is inadequate because DOR has no authority to award damages against the defendants in their individual capacities. Petitioners cite no reason or authority, and DOR is aware of none, that

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[9]In addition, Oregon law in effect at the time the Tax Court issued its decision dismissing plaintiffs' claims authorizes DOR to "issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it." Or. Rev. Stat. § 305.105.

would render administrative relief inadequate because that relief is paid out of one pocket rather than another. Petitioners do not suggest that DOR lacks the authority to grant them the refunds they seek if they are indeed entitled to those refunds. Moreover, Oregon indemnifies its officials for damages awarded against them for actions taken in the course and scope of their employment. Or. Rev. Stat. § 30.285. Thus, if petitioners prevail, they will be paid with state funds in any event. Under petitioners' view, due process would permit any person to evade state or federal requirements of exhaustion of administrative remedies merely by naming the head of the administrative agency as a defendant. Petitioners cite no support for this extravagant claim.[10]

3. Petitioners' assertion that the administrative remedy is inadequate because it is "burdensome" ignores this Court's decisions in *Grace Brethren*, *supra*, and *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). Those cases considered the adequacy of state remedies in the context of efforts by taxpayers to evade the bar of the Tax Injunction Act.[11] They held that the adequacy of state remedies is a procedural issue: if the state

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[10]The indemnification statute also answers petitioners' strained claim that requiring them to exhaust their administrative remedies would deny them due process because of defendant Munn's "direct pecuniary interest in this lawsuit." Pet. Cert. 19-20.

[11]The Tax Injunction Act prohibits enjoining state tax administration except where the state remedy is not "plain, speedy and efficient." The principles of comity on which the *McNary* majority relied require initial resort to state remedies unless they are not "plain, adequate, and complete." *McNary*, 454 US at 116. The *McNary* Court could "discern no significant difference, for purposes of the principles recognized in this case," between the two standards. *Id.* n. 8. Petitioners do not suggest that some other standard would properly govern this Court's determination of the adequacy of the state remedies in this case.

provides the opportunity for full factual hearing followed by judicial review, the state procedure is adequate. *Grace Brethren*, 457 U.S. at 411-13; *Rosewell*, 450 U.S. at 512-25.

Examining the language and history of the Tax Injunction Act in *Rosewell*, the Court concluded that the requirement of a "plain, speedy and efficient" remedy referred only to the *procedural adequacy* of the remedy. 450 U.S. at 512-525. A state remedy is adequate if the taxpayer had a "full hearing and judicial determination of the controversy." 450 U.S. at 514, *quoting* S. Rep. No .701, 72d Cong., 1st Sess., 2 (1932). The Court stated:

> There is no doubt that the Illinois state-court refund procedure provides the taxpayer with a "full hearing and judicial determination" at which she may raise any and all constitutional objections to the tax. . . . Appeal to the higher Illinois courts is authorized . . . and review is ultimately available in this Court . . . . Respondent does not allege any procedural defect in the Illinois remedy, other than delay, . . . that would preclude preservation and consideration of her federal rights, since she is free to raise her equal protection and due process federal objections during the Application for Judgment proceedings before the Circuit Court of Cook County.

450 U.S. at 514-15 (citations omitted).

The delay in coming to court, if any, caused by the exhaustion requirement does not render the administrative process inadequate. Indeed, the Illinois remedies considered in *Rosewell* were far more burdensome than those of which petitioners complain, resulting in delays of over two years at a time to obtain relief for repeated and egregious overassessment. Moreover, the Illinois system provided no interest to the ultimately victorious taxpayer, unlike the Oregon system. *See* Or. Rev. Stat. §§ 305.220, 305.222, 305.270 and 314.415.

Petitioners focus narrowly on the administrative process, asserting that they have asked for relief not available from the agency. By contrast, in both *Rosewell* and *Grace Brethren* the Court looked not only at the administrative process, but also at the judicial avenues open to the taxpayer dissatisfied with the results obtained in that process to determine whether petitioners had the opportunity for a full hearing and judicial review of their claims. Even though the California administrative agency in *Grace Brethren* lacked authority to declare the challenged statute unconstitutional, 457 U.S. at 413 n. 30, this Court found the state remedies plain, speedy and efficient because they met minimal procedural requirements and provided a full hearing and judicial review. Despite petitioners' attempts to evade the plain meaning of the Oregon Supreme Court's opinion, the Oregon courts provide a judicial forum for consideration and review of all their claims if they remain dissatisfied after availing themselves of the administrative process.[12] The state remedies are adequate.

4. Finally, petitioners assert that resort to administrative remedies would be futile.[13] In *Rosewell*, *supra*, the taxpayer

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[12]Even if the Court's examination were limited solely to the remedies provided by the administrative process, petitioners' argument is obviously flawed. If they were correct, any party could avoid an exhaustion requirement, whether state or federal, by simply asserting a manifestly frivolous claim for a form of relief the agency in question was not authorized to grant.

[13]Descending once again into unsupported attacks on the integrity of the state and its officials, petitioners assert that the gravamen of their action "is that defendants have implemented an unlawful scheme to mislead petitioners and the members of the class whom the petitioners seek to represent for the purpose of extinguishing as many claims as possible." Pet. Cert. 19 n. 27. While petitioners' 25 page "First Amended Class Action Complaint For

(continued...)

alleged that she was over-assessed year after year as the result of a knowing and deliberate policy on the part of the assessor and that she had never gained any relief at the administrative level from the assessor or the Board of Appeals. *See* 450 U.S. at 507-08 and nn. 5 and 6. Nevertheless, the Court, looking to the state system as a whole — including both the administrative and judicial components — found the state system adequate despite the obvious futility in fact of the administrative process.

Petitioners apparently contend that the mere assertion in their complaint that resort to administrative remedies would be futile is sufficient to justify bypass of those remedies. If that were correct, virtually all exhaustion requirements would be subject to immediate nullification in a swarm of original complaints brought under section 1983 and asserting, without basis in law or fact, that administrative remedies would be futile. In this respect, petitioners' futility claim is the same as their argument that the administrative remedy is inadequate, and it fails for the same reasons.

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[13](...continued)
Declaratory Judgment" unquestionably claims that defendants are enforcing against petitioners laws claimed to be unconstitutional, DOR's examination of that complaint reveals no assertion that defendants have attempted to mislead plaintiffs or to extinguish any claims. Petitioners' consistent attempts to vilify the state and its officers before the Court should be a clear signal to the Court that they seek to mask their inability to present a valid legal analysis.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,
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APPENDIX A

30.285 Public body shall indemnify public officers; procedure for requesting counsel; extent of duty of state; obligation for judgment and attorney fees. (1) The governing body of any public body shall defend, save harmless and indemnify any of its officers, employees and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

(2) The provisions of subsection (1)) of this section do not apply in case of malfeasance in office or wilful or wanton neglect of duty.

(3) If any civil action suit or proceeding is brought against any state officer, employee or agent which on its face falls within the provisions of subsection (1) of this section, or which the state officer, employee or agent asserts to be based in fact upon an alleged act or omission in the performance of duty, the state officer, employee or agent may, after consulting with the Department of General Services file a written request for counsel with the Attorney General. The Attorney General shall thereupon appear and defend the officer, employee or agent unless after investigation the Attorney General finds that the claim or demand does not arise out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of amounted to malfeasance in office or wilful or wanton neglect of duty, in which case the Attorney General shall reject defense of the claim.

(4) Any officer, employee or agent of the state against whom a claim within the scope of this section is made shall

cooperate fully with the Attorney General and the department in the defense of such claim. If the Attorney General after consulting with the department determines that such officer, employee or agent has not so cooperated or has otherwise acted to prejudice defense of the claim, the Attorney General may at any time reject the defense of the claim.

(5) If the Attorney General rejects defense of a claim under subsection (3) of this section or this subsection, no public funds shall be paid in settlement of said claim or in payment of any judgment against such officer, employee or agent. Such action by the Attorney General shall not prejudice the right of the officer, employee or agent to assert and establish an appropriate proceedings that the claim or demand in fact arose out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of did not amount to malfeasance in office or willful or wanton neglect of duty, in which case the officer, employee or agent shall be indemnified against liability and reasonable costs of defending the claim, cost of such indemnification to be a charge against the Insurance Fund established by ORS 278.425.

(6) Nothing in subsection (3), (4) or (5) of this section shall be deemed to increase the limits of liability of any public officer, agent or employee under ORS 30.270, or obviate the necessity of compliance with ORS 30.275 by any claimant, nor to affect the liability of the state itself or of any other public officer, agent or employee on any claim arising out of the same accident or occurrence.

(7) As used in this section, "state officer, employee or agent" includes district attorneys and deputy district attorneys,

special prosecutors and law clerks of the office of district attorney who act in a prosecutorial capacity, but does not include any other employee of the office of district attorney or any employee of the justice, district or circuit courts whose salary is paid wholly or in part by the county.

305.560 Procedure on appeal from order of department; procedure where taxpayer is not appellant; effect of failure to notify person appealing. . . . .

. . . .

(5) If the department fails to notify a person appealing to the director pursuant to this chapter within nine calendar months following the month in which the appeal is filed of its determination of the appeal, the person may treat the appeal as denied, and bring suit in the tax court by filing an original and one certified copy of a complaint against the department in the court. Such filing in the tax court shall constitute the perfection of the appeal. Service upon the department shall be accomplished in the same manner as provided in subsection (1) of this section.

305.105 Declaratory rulings by department. The Department of Revenue in its discretion may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it. The department shall prescribe by rule the form, content and procedure for submission, consideration and disposition of such petitions. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the department and all parties to the proceedings on the state of facts alleged, unless

it is altered or set aside by a court. A ruling shall be subject to review in the Oregon Tax Court and Supreme Court in the manner provided by ORS 305.445.

305.220 Interest on deficiency, delinquency or refunds; adjustments in rates; computation. (1) Unless specifically provided otherwise by statute or by rule of the director adopted pursuant to subsection (3) of this section, every deficiency or delinquency arising under any law administered by the Department of Revenue shall bear simple interest at the rate of five-sixths of one percent per month or fraction thereof.

(2) Unless specifically provided otherwise by statute or by rule of the director adopted pursuant to subsection (3) of this section, every refund arising under any law administered by the Department of Revenue shall:

(a) Bear interest at the rate of one percent per month, or fraction thereof, for interest periods beginning prior to June 1, 1983.

(b) Bear interest at the rate of one and one-half percent per month, or fraction thereof, for interest periods beginning on or after June 1, 1983, and prior to January 1, 1988, unless an adjustment was made under subsection (3) of this section in which case the adjusted interest rate shall be used for the period for which the adjustment was made.

(c) Subject to subsections (3) and (5) of this section and ORS 305.222, bear interest at the rate of five-sixths of one percent per month, or fraction thereof, for interest periods beginning on or after January 1, 1988.

(3)(a) If the director determines that the rates of interest for deficiencies, delinquencies and refunds established in subsections (1) and (2) of this section are at least one percentage point more or less than the prevailing rates of interest established by the Internal Revenue Service for underpayments arising under the federal tax laws to which one percentage point has been added, the director may adopt, by rule, adjusted interest rates. The director shall not adopt adjusted interest rates more than once in a calendar year. Notice of intent to adopt adjusted interest rates shall be given in the manner provided in ORS 183.335, not less than three months before the proposed effective date of the adjusted rates.

(b) In establishing the adjusted interest rates to be adopted under this subsection:

(A) The director shall take into consideration the current interest rates established by the Internal Revenue Service for underpayments arising under the federal tax laws.

(B) To any interest amount determined by taking into consideration the current interest rates established by the Internal Revenue Service for underpayments under subparagraph (A) of this paragraph, which interest amount shall be expressed at a rate per month or fraction thereof, there shall be added one-twelfth of one percent.

(4)(a) If the director adopts an adjusted interest rate for deficiencies and delinquencies for any interest period beginning prior to June 1, 1983, the director shall adopt an adjusted interest rate for refunds that is six percentage points below the adjusted interest rate for deficiencies and delinquencies for the same period.

(b) If the director adopts an adjusted interest rate for deficiencies and delinquencies for an interest period beginning on or after June 1, 1983, the director shall adopt an adjusted interest rate for refunds that is equal to the adjusted interest rate for deficiencies and delinquencies.

(5) Any change in the rate of interest applicable to deficiencies, delinquencies or refunds resulting from the adoption of adjusted interest rates by the director under this section shall apply to deficiencies, delinquencies and refunds outstanding on the effective date of the rule, or arising on or after that date, but only with respect to interest periods beginning on or after that date.

(6) If the rate of interest on a deficiency, a delinquency or a refund is governed by this section, and if a fraction of a month is involved in making the computation of interest on the deficiency, delinquency or refund, then for the fractional month, the simple interest otherwise provided shall be computed on a daily basis.

305.222 Determination of interest rate. For purposes of determining the interest rate established under ORS 305.220:

(1) In the case of a refund of tax ordered by the Oregon Tax Court or the Oregon Supreme Court and arising under any law administered by the Department of Revenue, if the refund is not paid by the department within 60 days after the date of the order, the interest rate provided under ORS 305.220 shall be one-third of percent greater than that so provided under ORS 305.220, but only with respect to interest periods that begin 60 days after that date the order is entered.

(2) In the case of a notice of assessment, or an assessment under ORS 305.265 (12), pursuant to any law administered by the department, if the deficiency or delinquency is not paid within 60 days after the date of the notice of assessment or the assessment, the interest rate provided under ORS 305.220 shall be one-third of one percent greater than that so provided under ORS 305.220, but only for periods beginning after 60 days after the date of notice of assessment or assessment under ORS 305.265 (12), whichever is applicable.

(3) If the deficiency or delinquency is appealed to the department or in a hardship situation to the Oregon Tax Court without prior payment of tax, then notwithstanding subsection (2) of this section, the increased rate of interest shall commence only for interest periods beginning after a 60-day period after the date that the order of the department, the Oregon Tax Court or the Oregon Supreme Court affirming the deficiency or delinquency is entered.

305.270 Refund of excess tax paid; claim procedure. (1) Except as provided in ORS 118.100, if the amount of the tax shown as due on a report or return originally filed with the department with respect to a tax imposed under ORS chapter 118, 119, 308, 310, 314, 316, 317, 318 or 321, or collected pursuant to ORS 305.620, or as corrected by the department, is less than the amount theretofore paid, or if a person files a claim for refund of any tax paid to the department under such laws within the period specified in subsection (2) of this section, any excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415.

(2) The claim shall be made on a form prescribed by the department, except that an amended report or return showing a refund due and filed within the time allowed by this subsection for the filing of a claim for refund, shall constitute a claim for refund. The claim shall be filed within the period specified in ORS 314.415 (1)(b) for taxes imposed under ORS chapters 310, 314, 316, 317 and 318, or collected pursuant to ORS 305.620 (except where any applicable ordinance specifies another period), within three years from the payment of the tax for taxes imposed under ORS chapter 118 or 119 and within two years of the payment of any tax under ORS chapter 308 or 321.

(3) Upon receipt of a claim for refund, or original report or return claiming a refund, the department shall either refund the amount requested or send to the claimant a notice of any proposed adjustment to the refund claim, stating the basis upon which the adjustment is made. A proposed adjustment may either increase or decrease the amount of the refund claim or result in the finding of a deficiency. If the proposed adjustment results in a determination by the department that some amount is refundable, the department may send the claimant the adjusted amount with the notice.

(4) The claimant may, within 30 days of the date of the notice of proposed adjustment, advise the department in writing of objections to the refund adjustment and may request a conference with the department, which shall be held within one year of the date of the notice. The department shall notify the claimant of a time and place for the conference, and appoint a conference officer to meet with the claimant for an informal discussion of the claim. After the

conference, the conference officer shall send to the claimant, by certified mail, a determination of the matter, and include therewith either a notice of refund denial or payment of any amount found to be refundable, together with any applicable interest provided by this section. If the conference officer determines that a deficiency exists, the officer shall include a notice of assessment with the determination.

(5) If no conference is requested, and the adjustments have not resulted in the finding of a deficiency, the following shall apply:

(a) If written objections have been made by the claimant, the department shall consider the objections, determine any issues raised and send the claimant a notice of refund denial or payment of any amount found to be refundable, together with any interest provided by this section.

(b) If no written objections are made, the notice of any proposed adjustment shall be final after the period for requesting a conference or filing written objections has expired.

(6) If no conference is requested, and the notice of proposed adjustment has asserted a deficiency, the department shall consider any objections made by the person denied the refund, make a determination of any issues raised, pay any refunds found due, with applicable interest, or assess any deficiency and mail a notice thereof within one year from the date of the notice of deficiency, unless an extension of time is agreed upon as described in subsection (7) of this section.

(7) If, prior to the expiration of any period of time prescribed in subsection (6) of this section for giving of notice of assessment, the department and the person consent in

writing to the deficiency being assessed after the expiration of such prescribed period, such deficiency may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period agreed upon.

(8) If the department refunds the amount requested as provided in subsection (3) of this section, without examination or audit of the refund claim, the department shall give notice of this to the claimant at the time of making the refund. Thereafter, the department shall have one year in which to examine or audit the refund claim, and send the notice of proposed adjustment provided for in subsection (3) of this section, in addition to any time permitted in ORS 314.410 or 314.415.

(9) The failure to hold a requested conference within the one-year period prescribed in subsection (4) of this section shall not invalidate any assessment of deficiency made within the one-year period pursuant to subsection (8) of this section or within any extension of time made pursuant to subsection (7) of this section, but shall invalidate any assessment of interest or penalties attributable to the deficiency. After an assessment has been made, the department and the person assessed may still hold a conference in accordance with ORS 305.115 (7) within 90 days from the date of assessment. If a conference is held, the 90-day period under ORS 305.280 (2) shall run from the date of the conference officer's written determination of the issues.

(10) The claimant may appeal any notice of proposed adjustment, refund denial or notice of assessment in the

manner provided in ORS 305.280. The failure to file written objections or to request or have a conference shall not affect the rights of appeal so provided. All notices and determinations shall set forth rights of appeal.

314.415 Refunds; interest; credits. (1)(a) If the department determines pursuant to ORS 305.270 that the amount of the tax due is less than the amount theretofore paid, the excess shall be refunded by the department with interest at the rate established under ORS 305.220, for each month or fraction of a month during a period beginning 45 days after the due date of the return or the date the tax was paid, whichever is the later, to the time the refund is made.

(b) No refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed by the taxpayer in compliance with ORS 305.270, nor shall a refund claimed on an original return be allowed or made in any case unless the return is filed within three years of the due date, excluding extensions, of the return in respect of which the tax might have been credited. If a refund is disallowed for the tax year during which excess tax was paid for any reason set forth in this paragraph, the excess shall not be allowed as a credit against any tax occurring on a return filed for a subsequent year. If the tax owed is less than $1, no refund shall be made.

(c) No interest on a refund to an employee of a tax withheld by an employer shall be paid for any period prior to the time the employee filed a personal income tax return for

the tax year involved, nor for any period prior to the day which is 45 days after the date when the employee's annual return for that year was filed or was due, whichever is the later.

(d) No interest on a refund of estimated tax paid under ORS 314.505 to 314.525 or 316.557 to 316.589 shall be paid for any period prior to the time the taxpayer filed a tax return for the tax year involved, nor for any period prior to the day which is 45 days after the date when the tax return for that year was filed or was due, whichever is later.

(e) The amount of the refund, exclusive of interest thereon, shall not exceed the portion of the tax paid during such period preceding the filing of the claim or, if no claim is filed, then during the period preceding the allowance of the refund during which a claim might have been filed. Where there has been an overpayment of any tax imposed, the amount of the overpayment and interest thereon shall be credited against any tax, penalty or interest then due from the taxpayer, and only the balance shall be refunded.

(f) Except as provided in ORS 305.265 (12), if, pursuant to a notice of deficiency or assessment, the taxpayer pays the amount specified in the notice, or any part thereof, and if, upon appeal, the department, the Oregon Tax Court or the Oregon Supreme Court orders that all or any part of the deficiency amount specified in the notice and paid by the taxpayer be refunded, the amount so ordered to be refunded shall bear interest at the rate established for refunds in ORS 305.220. Interest shall be computed from the date of payment to the department. Nothing in this paragraph shall require that interest be paid upon any amount for any period for which

interest upon the same amount for the same period is required to be paid under ORS 305.419.

(2) Notwithstanding any provision to the contrary in ORS 305.265 or 305.270 or subsection (1) of this section, if, prior to the expiration of the period prescribed in paragraph (b) of subsection (1) of this section, the department and the taxpayer consent in writing to the refund of tax after the expiration of the period prescribed, the refund shall be made at any time prior to the expiration of the period agreed upon and no refund shall be made or allowed after the expiration of the period agreed upon unless a claim for refund is filed by the taxpayer before the expiration of the period agreed upon in compliance with the manner prescribed by the department. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The department shall have the power to consent to such refund only where the taxpayer has consented to assessment of additional tax, if such be determined upon audit, after the expiration of the applicable three-year or five-year period prescribed in ORS 314.410 (1) and (2).

(3) If the claim for credit or refund relates to an overpayment on account of the deductibility by the taxpayer of the worthlessness of a share of stock in a corporation, of the right to subscribe for or to receive a share of stock in a corporation, or of a debt, in lieu of the three-year period of limitation prescribed in subsection (1) of this section, the period shall be seven years from the date prescribed by law for the filing of the return for the year with respect to which the claim is made; provided, that if the claim is made in reliance upon this

subsection after the expiration of the three-year period prescribed in paragraph (b) of subsection (1) of this section, no interest shall be allowed with respect to any credit or refund determined to be due upon such claim for the period beginning at the close of the three-year period prescribed in subsection (1) of this section and ending at the expiration of six months after the date on which the claim is filed.

(4)(a) If the claim for credit or refund relates to an overpayment attributable to a net operating loss carryback, in lieu of the three-year period of limitation prescribed in subsection (1) of this section, the period shall be that period which ends with the expiration of the 15th day of the 40th month following the end of the taxable year of the net operating loss which results in such carryback; except that and with respect to an overpayment attributable to the creation of, or an increase in, net operating loss as a result of the elimination of excessive profits by a renegotiation (as described under sections 1211 to 1233, Title 50, United States Code), the period shall not expire before the expiration of the 12th month following the month in which the agreement or order for the elimination of such excessive profits becomes final, whichever is the later. In the case of such a claim, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in paragraph (a) or (b) of subsection (1) of this section or subsection (2) of this section, whichever is applicable, to the extent of the amount of the overpayment attributable to such carryback. If the allowance of a credit or refund of an overpayment of tax attributable to a net operating loss carryback is otherwise prevented by the operation of any law or rule of law other than ORS 305.150,

relating to closing agreements, such credit or refund may be allowed or made, if claim therefor is filed within the period provided in this subsection. To the extent that the net operating loss carryback was not an issue in any proceeding in which the determination of a court, including the Oregon Tax Court, has become final, the claimed credit or refund applicable to that net operating loss carryback may be allowed or made under this subsection.

(b) For purposes of subsection (1) of this section, if any overpayment of tax results from a carryback of a net operating loss or net capital loss, such overpayment shall be deemed not to have been made prior to the later of:

(A) The due date of the return for the taxable year in which such net operating loss or net capital loss arises;

(B) The date the return for the year in which the net operating or net capital loss arises is filed; or

(C) The date of filing of the return for the year to which the net operating loss or net capital loss is carried back.

(5) Notwithstanding any provision to the contrary in ORS 305.265 or 305.270, or other provisions of this section, if the taxpayer has agreed with the United States Commissioner of Internal Revenue for an extension, or renewals thereof, of the period for proposing and assessing deficiencies in federal income tax for any year, the period within which a claim for credit or refund may be filed or credit or refund allowed or made if no claim is filed shall be the period provided within subsections (1) to (4) of this section or six months after the date of the expiration of the agreed period for assessing deficiency in federal income tax, whichever period expires the later.

(6) The department may make separate refunds of withheld taxes upon request by a husband or wife who has filed a joint return, the refund payable to each spouse being proportioned to the gross earnings of each shown by the information returns filed by the employer or otherwise shown to the satisfaction of the department.

(7) If a taxpayer entitled to a refund under subsection (1) of this section dies, the department may issue a draft for payment of such refund under the terms and conditions set out in ORS 293.490 to 293.500 exercising the same powers and subject to the same restrictions pursuant to which the State Treasurer is authorized to pay the amounts of warrants, checks or orders under those statutes.